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NO. 81473-2

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SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF BELLEVUE,

Petitioner,

v.

SHIN H. LEE,

Appellant.

**BRIEF OF *AMICUS CURIAE*
ATTORNEY GENERAL OF WASHINGTON**

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I. IDENTITY AND INTEREST OF AMICI CURIAE

Amicus curiae is the Attorney General of Washington. The Attorney General is the legal advisor to state agencies and officers. RCW 43.10.030(5). The Attorney General also represents agencies, including the Department of Licensing, in the courts. RCW 43.10.040. Many state agencies and entities represented by the Attorney General regularly issue administrative orders.

Under RCW 46.01.040(13), the Washington State Department of Licensing (department) is vested with all powers, functions, and duties with respect to driver licenses as provided in RCW 46.20. Under RCW 46.20.289, the department has the duty to suspend a driver's license upon receipt of notice from a court that the person has failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a notice of traffic infraction or citation. The department also is obligated to provide a constitutionally adequate opportunity to challenge the information upon which the department relies in suspending the driver's license. RCW 46.20.245.

The Attorney General and the department have an interest in carrying out these responsibilities in an efficient manner consistent with legislative and constitutional directives. In this challenge to the

constitutionality of a statute, even broader state interests are present. Recognizing the unique role of the Attorney General, the legislature has required that, in certain proceedings challenging the constitutionality of a statute, "the attorney general shall be served with a copy of the proceeding and be entitled to be heard." RCW 7.24.110. The public interest is heightened in any case involving a constitutional challenge to a statute. The Attorney General's constitutional and statutory powers include submission of amicus curiae briefs on matters affecting the public interest. See *Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 212, 588 P.2d 195 (1978).

II. STATEMENT OF THE CASE

A. Statutory Framework Governing The Mandatory Suspension Of A Driver's License Under RCW 46.20.289 And RCW 46.20.245

Before the statute under challenge is drawn into play, two things must have occurred. First, the person was issued a notice of traffic infraction, either by a law enforcement officer or a court, under RCW 46.63.030, or the person was arrested and issued a traffic citation and notice to appear in court, under RCW 46.64.015. Second, a court determined that the driver failed to comply with requisites relating to the notice of traffic infraction under RCW 46.63.070, or willfully failed to appear for a scheduled court hearing under RCW 46.64.025, and the court

has so notified the department, triggering its duty to suspend the driver's license under RCW 46.20.289 and RCW 46.20.245.¹

1. The Driver Must Respond In Writing To The Notice of Traffic Infraction Or To The Traffic Citation And Notice To Appear In Court

a. Notice Of Traffic Infraction

The notice of traffic infraction represents a determination that the infraction was committed, and is a final determination unless contested by the driver as provided in RCW 46.63. RCW 46.63.060.

The driver must respond to the notice of traffic infraction within 15 days. The driver does this by completing the appropriate portion of the notice and returning it to the court. The driver's options in responding to the notice are to: (1) not contest the determination and to submit with the response a check or money order for the amount of the monetary penalty stated on the notice of infraction; (2) contest the determination and request a court hearing; or (3) not contest the determination, but request a court hearing to explain mitigating circumstances surrounding the infraction. RCW 46.63.070.

If the first option is chosen, the court processes the fine and notifies the department of the determination so that the driver's driving record is updated to reflect the infraction. If the second or third option is

¹ The text of these statutes is set out in Appendix A.

chosen, the court schedules the hearing and sends a notice of hearing to the driver. RCW 46.63.070.

The notice includes three statements regarding the potential loss of the privilege to drive. First is the statement that the penalty for a traffic infraction may include sanctions against the person's driver's license including suspension, revocation, or denial. RCW 46.63.060(2)(b). Second, the notice states that if the person fails to respond to the notice within 15 days, the person's driver's license or driving privilege will be suspended by the department until any penalties imposed have been satisfied. RCW 46.63.060(2)(h). Third, the notice includes the statement that failure to appear at a hearing requested for the purpose of contesting the determination or for the purpose of explaining mitigating circumstances will result in the suspension of the person's driver's license or driving privilege. RCW 46.63.060(2)(i).

b. Traffic Citation And Notice To Appear In Court

Whenever a person is arrested for a violation of the traffic laws or regulations which are punishable as a misdemeanor or by imposition of a fine, the arresting officer may serve upon the person a traffic citation and notice to appear in court. RCW 46.64.015. Under RCW 46.64.025, if such person willfully fails to appear for a scheduled court hearing, the court notifies the department, triggering its duty to suspend the driver's

license under RCW 46.20.289 and RCW 46.20.245. The suspension endures until such time as the court files with the department a certificate showing that the case for which the person failed to appear has been adjudicated.

2. The Court Determines The Driver Failed To Comply Or Failed To Appear In Court And Notifies The Department

If the driver fails to respond to the notice of traffic infraction or fails to appear at a hearing, the court enters an order assessing the monetary penalty prescribed for the traffic infraction and any other penalty authorized by RCW 46.63, and notifies the department of the driver's failure to respond to the notice of infraction or to appear at a requested hearing. RCW 46.63.070(6).

If the court imposes a monetary penalty or other monetary obligation under RCW 46.63, the amount is immediately payable unless the court allows the driver to enter into a payment plan. If the driver does not immediately pay the obligation and/or comply with a payment plan, the court notifies the department. RCW 46.63.110(6)(a).

If the driver fails to appear for a scheduled hearing after being issued a citation under RCW 46.64.015, the court notifies the department pursuant to RCW 46.64.025.

3. The Department's Statutory Duty In An Administrative Review Is Limited To Correcting Ministerial Errors

In each situation described above, the court's notification to the department triggers its statutory duty to suspend the driver's license under RCW 46.20.289 and RCW 46.20.245. The department's responsibility is to give notice to the driver of the intended suspension and review rights and, if requested, to conduct an administrative review of documents and records submitted or available to the department, and a personal interview provided under RCW 46.20.245.

The department may not adjudicate whether a driver has a defense against the underlying infraction or citation, or whether the driver had a good reason for failure to respond to a notice of traffic infraction, failure to appear at a requested hearing, violation of a written promise to appear in court, or failure to comply with the terms of a notice of traffic infraction or citation. Such proffered defenses or reasons may be raised only to the court with jurisdiction over the underlying matter.

The department may only consider whether the information transmitted from the court regarding the person accurately describes the action taken by the court and whether the records identify the correct person. RCW 46.20.245(2)(b).

B. In These Consolidated Cases, The Respondents Failed To Challenge The Administrative Action Of The Department Of Licensing Suspending Their Licenses

In each of these consolidated appeals, a triggering event – such as a failure to appear in court – occurred, followed by notification by the court to the department. In response, the department sent each Respondent an Order of Suspension. It is undisputed that the Respondents were provided notice of an opportunity to request administrative review of their license suspension. Because the department receives notice directly from the court of the triggering event, administrative review does not include a factual determination by the department of whether the triggering event actually occurred. Rather, a licensee has an opportunity only to contest the accuracy of the documents provided to the department. RCW 46.20.245(2)(b).

It is undisputed that Respondents did not avail themselves of the opportunity to have administrative review; they did not submit any documentation, nor did they ask for more time. They simply did not respond. More importantly, the Respondents did not challenge the suspension of their licenses. After they received notice of the license suspension, they did not challenge that administrative action, nor did they challenge the department's statutory procedures. Their licenses therefore were suspended.

Later, each Respondent was cited for Driving While License Suspended in violation of RCW 46.20.342(1)(c). In the course of those proceedings, Respondents challenged the constitutionality of the pre-suspension procedural protections, which they did not exercise.² There is no indication in this record that Respondents have any basis to challenge the accuracy of any of the documents received by the department that formed the basis of their license suspensions. There is also nothing in this record demonstrating the existence of any evidence meriting dismissal of the charge of Driving While License Suspended.

III. ISSUES PRESENTED

1. Are Respondents barred from collaterally attacking the constitutionality of an administrative review process, from which they did not seek judicial review, in this criminal appeal?
2. Do the measures set out in RCW 46.20.245 provide adequate procedural safeguards, in accordance with the due process clause of the United States Constitution, to ensure against the erroneous deprivation of a driver's interest in the continued use and possession of his or her driver's license?

² Nor did Respondents seek judicial review of the suspension.

IV. ARGUMENT

A. Respondents May Not Collaterally Attack The Constitutionality Of The Administrative Review Process In This Criminal Appeal

The Respondents did not request an administrative review, nor did they avail themselves of any due process protections available to them before their license was suspended. The Respondents are certainly not required to utilize the procedure in order to challenge the adequacy of the procedure, but they are required to properly challenge the administrative action containing the procedure rather than waiting until a later criminal proceeding. In this criminal proceeding, Respondents may not challenge the constitutionality of the procedural protections allowed prior to final suspension of their license when they took no action to challenge the license. *City of Bellevue v. Montgomery*, 49 Wn. App. 479, 481, 743 P.2d 1257 (1987).

In a similar case, the Court of Appeals in *Upward v. Dep't of Licensing*, 38 Wn. App. 747, 689 P.2d 415 (1984), addressed "whether an adjudication that one is a habitual offender as defined in the Habitual Traffic Offender Act, RCW 46.65, can be challenged successfully in a later civil or criminal proceeding by collaterally attaching the validity of the requisite number of traffic infractions relied upon to establish habitual offender status." *Id.* at 748. The court held that the earlier adjudication

cannot be challenged. While there may be certain kinds of predicate offenses that could be collaterally challenged, there is no indication that this is one of those rare circumstances where it would be permissible. *See, e.g., Upward*, 38 Wn. App. at 749-50, citing *State v. Ozuna*, 93 Wn.2d 533, 611 P.2d 407 (1980); *State v. Smith*, 155 Wn.2d 496, 120 P.3d 559 (2005) (a successful challenge to a conviction for driving while license suspended or revoked based upon insufficient evidence to support a necessary element of the crime).

In, *In re Personal Restraint of Gronquist*, 138 Wn.2d 388, 978 P.2d 1083 (1999), an inmate attempted to collaterally challenge the facts surrounding a minor infraction which formed the basis for a major infraction (the commission of four underlying minor infractions within a specified period of time). This Court held the inmate may not relitigate the underlying minor infractions. *Id.* at 391. In that decision, this Court cited to federal sentencing proceedings, immigration matters, and Washington's Persistent Offender Accountability Act, as examples where challenge of the underlying offense is not permitted. *Id.* at 404-06.

Amicus recognizes that raising this argument for the first time before this Court is problematic. However, statutory procedures to avoid such irregularity were not followed in this case. The Appellants characterize this action as a facial challenge to a state statute. App. Br. at

5. Indeed, this Court's Ruling Granting Direct Discretionary Review states that this appeal is a "constitutional challenge to the statute." Ruling Granting Direct Discretionary Review at 1.

The superior court found unconstitutional RCW 46.20.245, a statute governing the administrative review process that the Department of Licensing, a state agency, must follow before a driver's license is suspended. Nevertheless, the Attorney General's Office was not notified of the constitutional challenge and, therefore, was not heard below.

RCW 7.24.110 states:

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard.

(Emphasis added).

Failure to comply with RCW 7.24.110 deprived the Attorney General of the opportunity to provide the lower courts with appropriate briefing, including whether a collateral attack on the procedures contained in RCW 46.20.245 is permissible.

B. RCW 46.20.245 Provides Adequate Procedural Safeguards, In Accordance With The Due Process Clause Of The United States Constitution, To Ensure Against The Erroneous Deprivation Of A Driver's License

1. The Superior Court Misapplied *City of Redmond v. Moore*, 151 Wn.2d 664, 91 P.3d 875 (2004)

The superior court concluded this statute violates both substantive and procedural due process because “[t]here is no opportunity for cross examination or any other due process protections as a matter of right [and n]o witnesses can be subpoenaed and no live testimony can be taken.” Br. Pet’r, App. C at 1. Therefore, according to the superior court, the statute failed “to address the due process concerns raised in *Redmond v. Moore*, 151 Wn.2d 664, 91 P.3d 875 (2004).” Br. Pet’r, App. C at 2.

This conclusion is erroneous, both with respect to the body of constitutional law regarding due process, and with respect to this Court’s expressed concerns in *Moore*. This Court in *Moore* held former RCW 46.20.289 and .324(1) “are contrary to the guaranty of due process because they do not provide adequate procedural safeguards to ensure against the erroneous deprivation of a driver’s interest in the continued use and possession of his or her driver’s license.” *Moore*, 151 Wn. 2d at 677. Those statutory provisions lacked “adequate procedural safeguards” because of the complete absence of a departmental process by which the driver could demonstrate the impending suspension was based on

incorrect data. Nowhere in *Moore* did this Court suggest the procedural process that was due included the ability to put on live testimony or to compel witnesses or to cross-examine them.

Instead, this Court's expressed concern was the statutory prohibition against the department providing an administrative appeal of a mandatory suspension meant there was no ability to correct "ministerial errors that might occur when DOL processes information obtained from the courts pertaining to license suspensions and revocations, e.g., misidentification, payments credited to the wrong account, the failure of the court to provide updated information when fines are paid." *Id.* at 675. Other potential sources of ministerial error, according to the drivers in *Moore*, included "miscalculation of the fine, or errors in the conviction form." *Id.* at 669.

The legislature promptly responded to this Court's decision in *Moore*.³ This enactment set out a process by which a driver could readily notify the department of such ministerial errors, the department could readily cross check the information provided by the driver with that provided by the court, and could readily correct its own errors. Additionally, the legislature gave to drivers, with no legitimate basis to challenge their suspensions due to such ministerial errors, ample time (45

³ See Laws of 2005, ch. 288.

days) to work with the courts to come into compliance so that their licenses would not be suspended.⁴ Importantly, the driver may also obtain judicial review of the department's decision issued after its administrative review. RCW 46.20.245(2)(e).

Perhaps the superior court interpreted the *Moore* decision to mean the department must allow the driver to contest the substance of the court's determination, not just ministerial error, and doing so requires a full evidentiary hearing on whether the driver was responsible for the underlying act or omission. But that is not the holding of *Moore*, nor is that consistent with the statutory scheme.⁵ RCW 46.20.245 provides sufficient protections to address the concerns of this court in *Moore*.

2. The Procedures Provided By RCW 46.20.245 Are Constitutionally Adequate

The principle expressed in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), is that, though the procedures may vary according to the interest at stake, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Id.* at 333. The current procedures provide for notice

⁴ Under former law, the suspension was to be imposed 30 days after notice of the suspension and there was no provision for judicial review of the suspension.

⁵ This Court in *Moore* made a point of noting that the issue before it was not whether the department "could have cured [a court's] ministerial errors of its own accord but whether the statute provides due process of law [to ensure against the erroneous suspension of a driver's license because of those ministerial errors]." *Moore*, 151 Wn.2d at 673 n.3.

of the proposed departmental action on a date certain. The notice provides the reason for that action, and the opportunity to contest that action before it is taken. This pre-termination notice satisfies the requirement of an opportunity to be heard at a meaningful time.

The superior court apparently was concerned with a driver's opportunity to be heard in a meaningful manner, but the order lacks any indication that the court engaged in the analysis required by *Mathews*: to determine whether existing procedures are adequate to protect the interest at stake, a court must consider (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335.

Here, the focus is on the second factor. Keeping in mind that the nature of a due process hearing required by the constitution is shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exception,⁶ the truth-finding exercise in the license suspension process involves ferreting out merely ministerial

⁶ *Mathews*, 424 U.S. at 344.

errors. Neither the superior court nor the Respondents have explained how the risk of error, if any, inherent in the truth-finding process provided by RCW 46.20.245 can be reduced by allowing live testimony, compulsion of witnesses, or cross-examination of them.

The word “hearing” itself has no particular meaning when applying the *Mathews* factors. Hearings may take many forms, including a formal trial-type proceeding, an informal discussion, or a paper hearing, without any opportunity for oral exchange. *Gray Panthers v. Schweiker*, 652 F.2d 146, n.3 (D.C. Cir. 1981). As this Court stated in *Personal Restraint Petition of McCarthy*, 161 Wn.2d 234, 241-42, 164 P.3d 1283 (2007), “The quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error.” (Citations omitted).

Judicial-type hearings are not required in all cases; depending upon the matters contested, an informal oral hearing or a paper hearing may be appropriate. See *Gray Panthers v. Schweiker*, 716 F.2d 23 (D.C. Cir. 1983) (holding that the procedure for recouping Medicare overpayments, when the disputed issue involves computational errors, may be conducted by a paper hearing and/or a telephone call); H. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1281 (1975).

Courts have held there is no right to compel, confront and cross-examine witnesses in driver suspension hearings under circumstances similar to the matters at issue in RCW 46.20.245. *See, e.g., Burri v. Campbell*, 434 P.2d 627 (Ariz. 1968). *Burri* involved a challenge to the administrative procedure used to suspend the license of a driver involved in an accident while operating an automobile that was not covered by liability insurance, and the registration certificate and license plates of the automobile owner, unless a financial responsibility bond was posted and proof of future insurance given. The question before the agency was not whether the driver was culpable, but whether, and in what amount, a judgment could be recovered against the driver. Information to guide the decision maker could be obtained through affidavits and oral argument alone.

State v. Jones, 708 P.2d 1168 (Or. 1985), also involves a situation similar to the matter under review. There, the motor vehicle department (MVD) sent notice to the driver informing him his driver license would be suspended for failure to comply with a court order but that the suspension would not go into effect if he obtained a clearance from court within 20 days. The notice identified relevant court docket numbers, and provided the driver with ample information to enable the driver to point out any errors to the court and obtain a clearance. The court held this procedure

was a constitutionally sufficient “predeprivation opportunity to be heard.”

Id. at 1172.

[T]he procedure used creates little risk of erroneous deprivation because a court’s order of suspension is a reasonably reliable basis for a suspension and because, even if a mistake occurred, the MVD notice provided a procedure for correcting it. Although . . . mistakes were ‘not unheard of or even rare,’ we do not think that an occasional mistake makes a court order an unreliable basis for an MVD suspension.

Id. at 1172 (footnote omitted).

With respect to the probable value, if any, of additional or substitute procedural safeguards, the driver sought the additional safeguard of a contested case hearing under the Oregon Administrative Procedures Act. He claimed that a pre-suspension contested case hearing would have resolved the factual issues about outstanding fines, would have revealed clerical errors, and would have allowed him to raise legitimate excuses, such as financial hardship, for non-payment. The court concluded a contested case procedure would provide no additional protection against error, since the driver could just as easily have resolved those issues by applying to the district court for a clearance. *Id.* at 1172.

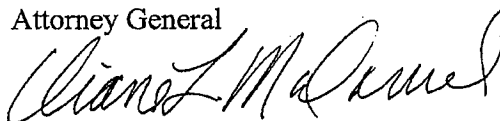
As in the cases discussed above, the procedures in RCW 46.20.245 comport with the requirements of due process.

V. CONCLUSION

Because the Respondents may not collaterally attack procedures contained in RCW 46.20.245 in this proceeding, and because the procedures in any event comport with the requirements of due process, the holding of the superior court should be reversed.

RESPECTFULLY SUBMITTED this 17th day of October, 2008.

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APPENDIX A

APPENDIX A

RCW 46.20.289 Suspension for failure to respond, appear, etc.

The department shall suspend all driving privileges of a person when the department receives notice from a court under RCW 46.63.070(6), 46.63.110(6), or 46.64.025 that the person has failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a notice of traffic infraction or citation, other than for a standing, stopping, or parking violation, provided that the traffic infraction or traffic offense is committed on or after July 1, 2005. A suspension under this section takes effect pursuant to the provisions of RCW 46.20.245, and remains in effect until the department has received a certificate from the court showing that the case has been adjudicated, and until the person meets the requirements of RCW 46.20.311. In the case of failure to respond to a traffic infraction issued under RCW 46.55.105, the department shall suspend all driving privileges until the person provides evidence from the court that all penalties and restitution have been paid. A suspension under this section does not take effect if, prior to the effective date of the suspension, the department receives a certificate from the court showing that the case has been adjudicated.

[2005 c 288 § 5; 2002 c 279 § 4; 1999 c 274 § 1; 1995 c 219 § 2; 1993 c 501 § 1.]

Notes:

Effective date -- 2005 c 288: See note following RCW 46.20.245.

RCW 46.20.245 Mandatory revocation — Notice — Administrative, judicial review — Rules — Application.

(1) Whenever the department proposes to withhold the driving privilege of a person or disqualify a person from operating a commercial motor vehicle and this action is made mandatory by the provisions of this chapter or other law, the department must give notice to the person in writing by posting in the United States mail, appropriately addressed, postage prepaid, or by personal service. Notice by mail is given upon deposit in the United States mail. Notice given under this subsection must specify the date upon which the driving privilege is to be withheld which shall not be less than forty-five days after the original notice is given.

(2) Within fifteen days after notice has been given to a person under subsection (1) of this section, the person may request in writing an administrative review before the department. If the request is mailed, it must be postmarked within fifteen days after the date the department has given notice. If a person fails to request an administrative review within fifteen days after the date the department gives notice, the person is considered to have defaulted and loses his or her right to an administrative review unless the department finds good cause for a request after the fifteen-day period.

(a) An administrative review under this subsection shall consist solely of an internal review of documents and records submitted or available to the department, unless the person requests an interview before the department, in which case all or any part of the administrative review may, at the discretion of the department, be conducted by telephone or other electronic means.

(b) The only issues to be addressed in the administrative review are:

(i) Whether the records relied on by the department identify the correct person; and

(ii) Whether the information transmitted from the court or other reporting agency or entity regarding the person accurately describes the action taken by the court or other reporting agency or entity.

(c) For the purposes of this section, the notice received from a court or other reporting agency or entity, regardless of form or format, is prima facie evidence that the information from the court or other reporting agency or entity regarding the person is accurate. A person requesting administrative review has the burden of showing by a preponderance of the evidence that the person is not subject to the withholding of the driving privilege.

(d) The action subject to the notification requirements of subsection (1) of this section shall be stayed during the administrative review process.

(e) Judicial review of a department order affirming the action subject to the notification requirements of subsection (1) of this section after an administrative review shall be available in the same manner as provided in RCW 46.20.308(9). The department shall certify its record to the court within thirty days after service upon the department of the petition for judicial review. The action subject to the notification requirements of subsection (1) of this section shall not automatically be stayed during the judicial review. If judicial relief is sought for a stay or other temporary remedy from the department's action, the court shall not grant relief unless the court finds that the appellant is likely to prevail in the appeal and that without a stay the appellant will suffer irreparable injury.

(3) The department may adopt rules that are considered necessary or convenient by the department for purposes of administering this section, including, but not limited to, rules regarding expedited procedures for issuing orders and expedited notice procedures.

(4) This section does not apply where an opportunity for an informal settlement, driver improvement interview, or formal hearing is otherwise provided by law or rule of the department.

[2005 c 288 § 1.]

Notes:

Effective date -- 2005 c 288: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 2005." [2005 c 288 § 9.]